Appendix A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 15285 SEPTEMBER TERM 1965—APRIL SESSION 1966

INDIANA & MICHIGAN ELECTRIC COMPANY, *Petitioner*,
v.
FEDERAL POWER COMMISSION, *Respondent*.

On Petition for Review of Final Orders of the Federal Power Commission

JULY 13, 1966

Before DUFFY, KNOCH and KILEY, *Circuit Judges*.

DUFFY, *Circuit Judge*. The orders of the Federal Power Commission here under review (Opinion No. 458) issued April 14, 1965 and Opinion No. 458-A issued June 11, 1965, 33 FPC .....), require the Indiana & Michigan Electric Company (I&M) to file with the Commission its rate schedules covering wholesale sales to fourteen municipal electric systems and seven rural electric cooperative systems located in Indiana, and two municipal electric systems and one rural electric cooperative system located in Michigan, all of which sales were found by the Commission to be in interstate commerce.

Petitioner appeals from the above orders claiming there is no basis in law or in fact for the finding below that the Federal Power Commission has jurisdiction over the sales here in issue. The Federal Power Commission has juris-

diction over the wholesale sale of electric energy only if the sale is in interstate commerce. 16 U.S.C. §824. Petitioner also claims it did not receive a fair hearing in accordance with due process of law.

Indiana & Michigan Electric Company, together with five other operating companies, is an integral part of the American Electric Power System (AEP), a single coordinated power system operating as an integrated unit in Michigan, Indiana, Ohio, Kentucky, West Virginia, Virginia and Tennessee, with generating facilities combined by an inter-connected transmission grid. The System's dispatching center at Canton, Ohio, directs the dispatch and utilization of energy on a continuous basis to provide the capacity and energy required to carry all the customer demands in the seven-state area at maximum economy.

The proof shows that I&M realizes substantial advantages from its participation in the integrated operations including savings in capital outlay for generating facilities, savings in the cost of generating and transmitting energy, better control and maintenance of voltage levels and greater reliability of service.

The System serves more than 5,400,000 people, and is tied together by a network of 14,000 circuit miles of 345,000 volt line, the highest voltage in general use in the United States. The System is interconnected with nineteen other electric power systems at sixty-six locations, including thirty-nine major, high-voltage interconnections.

The electric load of every customer of every operating company in the System is supplied with electric energy from the entire AEP pool.

AEP makes no attempt to control energy flows on individual lines because electric energy flows freely and auto-

matically as determined by the electric characteristics of the network and operations of the System. Only the net of flows over all interconnections is controlled by increasing or decreasing generation so as to maintain interconnection schedules and to maintain frequencies at 60 cycles.

I&M daily transmits electric energy across the Indiana-Michigan border. The proof showed that I&M's total annual generation in Michigan is insufficient to supply the annual demand of its Michigan wholesale customers, and the additional amounts of energy needed are provided by I&M from sources outside the state of Michigan.

The Commission found that the evidence in the record clearly showed the receipt of out-of-state energy by I&M's wholesale customers. The Commission said: "Moreover, while it is not practicable to trace the energy flows precisely from specific generating plants to specific loads, the company records show conclusively that energy generated outside Indiana and Michigan pervades I&M's facilities and is delivered to those portions of I&M's system serving the municipals and cooperatives, and we so find. Thus, I&M receives electric energy from Ohio Power Company, The Cincinnati Gas and Electric Company, Commonwealth Edison Company, Ohio Valley Electric Corporation, and probably, Illinois Power Company, all of whose generation is located outside of Indiana or Michigan, and transmits this energy on its high voltage transmission network. For instance, the energy from Commonwealth Edison is received at I&M's Olive Substation in northern Indiana, and, when the I&M generating units at the Twin Branch station are not operating, commingled energy through Olive supplies practically all of the electric needs of north central Indiana and Michigan area. . . ."

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Petitioner insists that Federal Power Commission sales jurisdiction must be proved by substantial scientific and engineering evidence that out-of-state energy flows to each sale in issue and that these sales are not made over facilities used in local distribution. I&M insists that the AEP system is too complex to permit ascertainment that out-of-state energy did or did not reach I&M's wholesale customers.

I&M contends that the most that can be said for the evidence produced by the Federal Power Commission in this case is that there does exist a hypothetical possibility that any particular load of an electric system connected to an interstate system could, in fact, be receiving energy at any given moment solely from an in-state source; solely from an out-of-state source; or from a combination of both.

Electric energy moves at approximately 186,000 miles per second—the speed of light. It cannot be stored and is generated as needed. The loads which are usually supplied by various generating sources on a network, change from moment to moment, being added to, increased, decreased, or cut off at the discretion of the customer. Every change affects every other generating unit connected with the network because they are interlocked electromagnetically.

The amount of system generation is constantly changing and system frequency, which is an indication of the speed of the generators, also fluctuates continually; usually a bit above or a bit below 60 cycles.

Every connected generator in AEP's seven-state system, contributes energy to the system in order to supply part of the increment of an additional load and to main-

tain the balance in the system between generation and load.

American Electrical Power Service Corporation (AEP), pursuant to a contract between itself and the operating subsidiaries, renders centralized management, engineering and supervisory service, and operates the dispatching center so that the minute-to-minute energy requirements of the system are met by those generating facilities that can be operated most economically at the time of need.

With few exceptions, all of the electrical energy produced by the generating units in the System is delivered to the high voltage lines of the common seven-state transmission grid from which all of the customers of the companies in the pool are supplied.

Although I&M has generating capacity more than sufficient to meet the energy needs of its Indiana and Michigan customers, it frequently generates insufficient energy to meet its own requirements. For example, during 1962, I&M's Twin Branch generating station, with 29% of I&M's steam electric capacity, generated only 7% of I&M's steam electric production. Because of its relatively high fuel costs, the Twin Branch station was shut down for 107 full days in 1962, and for some hours of each of 164 other days in that year.

Consequently, many of the interconnection transactions with non-affiliated companies are transactions in which the energy sold is generated at a cost lower than it would cost the buyer to generate it. To illustrate, the low-cost energy from Appalachian Power Company and Ohio Power Company is used by I&M in place of energy which could have been generated at a higher cost at its Twin Branch plants.

It is impossible to match generating instantly to the load variations and frequency deviations that are con-

stantly occurring, but the System keeps these deviations as small as possible by tie-line and frequency control equipment. As a result, says the Commission, each day of the year there are transfers of electric energy into and out of I&M's electric system across the Indiana-Ohio and Indiana-Illinois borders.

We must first consider here 1) whether the electric energy sold by I&M, a member of an integrated seven-state electric power system that meets its system loads with power generated in various states on the basis of economy, are sales in interstate commerce subject to the jurisdiction of the Federal Power Commission, and 2) whether the facilities used in making such sales are facilities used in local distribution, and if so, whether for that reason the sales are beyond the jurisdiction of the Commission.

The first sentence of I&M's brief emphasizes that for more than forty years, the regulation of plaintiff's sales of electric energy has been by the state of Indiana. Although Indiana has exercised jurisdiction over I&M's sales up until the present, it has been held that "a history of previously unchallenged regulation by the State does not oust the Commission of jurisdiction." *State of Wisconsin* v. *Federal Power Commission,* D.C. Circuit, 201 F.2d 183, 185, cert. den. 345 U.S. 934.

We think the proof before the Commission was sufficient to show that out-of-state energy reached all of the wholesale customers. True, point to point tracing was impossible. This kind of tracing requires automatic recording meters at various points on the system and I&M does not need and does not have such meters. Hence, I&M insists that this kind of proof is not possible on their system, and that no other kind or type of proof can be sufficient.

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We think the Commission was justified in holding that the important consideration in determining jurisdiction here is the integrated interstate pool character of the operation. There is no dispute in the evidence but that in the AEP electric system, of which I&M is a part, a pool of energy generated in several states supplies the entire system load, without reference to state or corporate lines.

The unpredictable and free-flow of energy in the System in response to any number of constantly changing occurrences, makes it certain, in the view of the Federal Power Commission that out-of-state energy received by I&M at a number of points at or near its eastern, southern or western borders, at one time or another, reaches each of I&M's wholesale customers.

We hold the Commission was justified, based upon expert opinion evidence and otherwise, in holding the sales by I&M to its wholesale customers were in interstate commerce and were subject to the jurisdiction of the Federal Power Commission. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414.

In the *Pennsylvania Water* case, the Supreme Court, in referring to the integrated interstate electric system involved, quoted approvingly from the Commission's opinion below which had stated:

> "In this manner energy crossing the State boundary, with other system energy, is used to fulfill system requirements. There result times when system energy generated in Pennsylvania is used, mixed or unmixed, in meeting system requirements in Maryland. Similarly, there are occasions when system energy from Maryland is used, mixed or unmixed, in meeting system requirements in Pennsylvania. Ener-

gy flows in, across, and out of the system transmission network as the needs of the interconnected members develop from minute to minute and day to day.

"It is accordingly evident that the operations of the unified system enterprise are completely interstate in character, notwithstanding the fact that system energy transactions at some particular times may involve energy never crossing the State boundary."

We reject I&M's fundamental proposition in this case that in order to prevail, the Federal Power Commission must do what I&M claims to be impossible, that is, to prove by either tracing or some other unnamed "scientific and engineering proof" that out-of-state energy reaches the wholesale customers. We might recall that even in criminal cases, guilt beyond a reasonable doubt often can be established by circumstantial evidence.

We also reject I&M's argument that the facilities used to deliver electric energy to I&M's wholesale customers are "facilities used in local distribution" and that therefore I&M's sales are exempt from Commission jurisdiction under 16 U.S.C. §864(b) which provides: ". . . The Commission . . . shall not have jurisdiction . . . over facilities . . . used in local distribution or only for the transmission of electric energy in intrastate commerce. . . ." The exemption for local distribution facilities applies to a company's status as a public utility and not as to the Commission's jurisdiction over sales in interstate commerce for resale. *Wisconsin and Michigan Power Co.* v. *Federal Power Commission*, 7 Cir., 197 F.2d 472, 477.

We now consider the claim of I&M that the Commission did not afford it a fair hearing.

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On July 16, 1963, I&M filed applications for *subpoenas duces tecum* and *ad testificandum* to take the depositions of the Chairman, Secretary and a staff member of the Power Commission. These applications were denied on the basis that under the circumstances present, Commission members were not subject to examination; that data requested was in the public files and was available to I&M, and that the subpoena was a blanket request for data of appropriate persons, studies and analyses which were the bases underlying the issues of the order to show cause which initiated this proceeding. Particular documents were not identified or specified.

On August 30, 1963, I&M sued in the District Court for the Northern District of Indiana, for mandamus and for an injunction to stay proceedings and compel the granting of discovery. The complaint was dismissed for want of jurisdiction. *Indiana & Michigan Electric Co.* v. *Federal Power Commission*, 224 F. Supp. 166. The appeal from that order was dismissed.

We hold that the procedural objections of I&M are without merit, and that the various rulings of the Commission objected to by I&M did not result in that Company being denied a fair hearing.

The orders of the Federal Power Commission here in issue are

AFFIRMED

KNOCH, *Circuit Judge.* (dissenting) I must respectfully dissent from the majority. It seems to me that we must find some substantial scientific or engineering evidence that the out-of-state energy did in fact flow to the Indiana sales in issue; that the circumstantial evidence on which the Commission and the majority rely is insufficient to

justify taking the regulation of the Indiana sales in question out of the hands of the long-established state authority. I am also inclined to agree with Judge Eschbach (*Indinana & Michigan Electric Co.* v. *Federal Power Commission*, D.C., N.D., Indiana, 1963, 224 F. Supp. 166, 170) "that the record in the instant case constitutes an alarming example of how a private litigant before an administrative agency may be denied the opportunity to pursue the orderely procedures so vital to our traditional notions of fair play."

I would reverse the order of the Commission and remand the case with instructions to enter a dismissal for want of jurisdiction.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Wednesday, July 13, 1966

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

INDIANA & MICHIGAN ELECTRIC COMPANY,
Petitioner,

No. 15285 vs.

FEDERAL POWER COMMISSION,
Respondent.

Petition for review of orders of the Federal Power Commission.

This cause came on to be heard on the petition for review of orders of the Federal Power Commission and the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the orders of the Federal Power Commission entered in this cause on April 14, 1965, and June 11, 1965, be, and the same are hereby AFFIRMED, in accordance with the opinion of this Court filed this day; and upon presentation, an appropriate decree will be entered.

Appendix C

Section 201 of the Federal Power Act, 16 U. S. C. §824, 49 Stat. 847

DECLARATION OF POLICY—APPLICATION OF PART—DEFINITIONS

Sec. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof;

but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Section 205 of the Federal Power Act, 16 U. S. C. §824d, 49 Stat. 851

RATES AND CHARGES—SCHEDULES—SUSPENSION OF NEW RATES

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission,

(1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so

orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Appendix C

Section 206 of the Federal Power Act, 16 U. S. C. §824e, 49 Stat. 852

POWER OF COMMISSION TO FIX RATES AND CHARGES—DETERMINATION OF COST OF PRODUCTION OR TRANSMISSION

Sec. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

Section 307 of the Federal Power Act, 16 U. S. C. §825f, 49 Stat. 856

INVESTIGATIONS BY COMMISSION—ATTENDANCE OF WITNESSES—DEPOSITIONS—IMMUNITY OF WITNESSES

Sec. 307. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any

person has violated or is about to violate any provision of this Act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this Act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation concerning the matters to which this Act relates. The Commission may permit any person to file with it a statement in writing under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish or make available to State commissions information concerning any such subject.

(b) For the purpose of any investigation or any other proceeding under this Act, any member of the Commission, or any officer designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which the Commission finds relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States at any designated place of hearing. Witnesses summoned by the Commission to appear before it shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memo-

randa, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine or not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the Commission, by deposition, at any time after the proceeding is at issue. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any person authorized to administer oaths not being of counsel or attorney to either of the parties, nor interested in the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce

documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission, as hereinbefore provided. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(e) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(f) Witnesses whose depositions are taken as authorized in this Act, and the person or officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(g) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, contracts, agreements, or other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Appendix C

Section 308 of the Federal Power Act, 16 U. S. C. §825g, 49 Stat. 858

HEARINGS—RULES OF PROCEDURE

Sec. 308. (a) Hearings under this Act may be held before the Commission, any member or members thereof or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission, in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers, or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

(b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act.

Appendix C

Section 313(b) of the Federal Power Act, 16 U. S. C. §825*l*(b), 49 Stat. 860 as Amended 62 Stat. 991, 63 Stat. 107, 72 Stat. 947

REHEARINGS: COURT REVIEW OF ORDERS

Sec. 313

* * *

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of

the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

Section 12 of the Administrative Procedure Act, 5 U. S. C. A. §1011, 60 Stat. 244

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede

or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Rule 23(a) of the Federal Power Commission Regulations of Practice and Procedure, 18 C. F. R. §1.23(a), 12 F. R. 8479

Sec. 1.23. Subpenas.—(a) *Issuance.* Subpenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the Commission upon its own motion, will issue only upon application in writing to the Commission or the presiding officer, except that during sessions of a hearing in a proceeding, such application may be made orally on the record before the Commission or presiding officer, who is hereby given authority to determine the relevancy and materiality of the evidence sought and to issue such subpenas in accordance with such determination. Such written applications shall be verified and shall specify as nearly as may be the general relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification as nearly as may be, of the documents desired and the facts to be proved by them in sufficient detail to indicate the materiality and relevance of such documents.